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Acting Chairman
Alberta E. Mills
Secretary of the Commission
Justin Jirgl
Compliance Officer
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Re: *Revisions to Safety Standards for Crib Bumpers/Liners*, Docket Number CPSC-2020-0010

Acting Chairman Adler:

The New Civil Liberties Alliance (NCLA) submits the following commentary in response to the rule proposed by the Consumer Product Safety Commission (CPSC), *Revisions to Safety Standard for Crib Bumpers/Liners*, 85 Fed. Reg. 18878 (April 3, 2020) (Proposed Rule).

NCLA sincerely appreciates this opportunity to comment and express its concerns about the Proposed Rule. It is important to note, however, that CPSC's refusal to provide free and open access to the safety standards (or revisions thereto) that it proposes drastically undermines the public's ability to participate meaningfully in notice-and-comment rulemaking. Considering the constraints imposed by CPSC's secret lawmaking, NCLA confines its commentary to procedural objections.

Due process requires that the government, at a minimum, adequately inform the public of its legal obligations before proceeding to hold the public accountable for proscribed conduct. Forcing the public to pay for access to the law offends our constitutional structure, due process, the First Amendment, and equal protection. The Proposed Rule continues an odious trend of CPSC's incorporating private standards into the law only by reference, thereby hiding the law behind a paywall. The Proposed Rule is therefore unconstitutional and must not be enacted as proposed.

NCLA intends this comment to serve as significant adverse commentary, which should require CPSC to withdraw the Proposed Rule. On six prior occasions, NCLA offered similar objections to CPSC's incorporating safety standards by reference.[1] CPSC's General Counsel responded to NCLA, in three letters dated February 6, 2020, stating that CPSC did not treat NCLA's first three comments as significantly adverse. At least two developments since CPSC's February 6 letters should cause the Commission to rethink its position and consider this comment to be significantly adverse.

On February 20, 2020, NCLA's client, Lisa Milice (a new mother), petitioned the U.S. Court of Appeals for the Third Circuit to review CPSC's incorporating by reference Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064. Her victory in that lawsuit ultimately will require CPSC to publish or repeal *all* rules incorporated by reference.

Even more recently, on April 24, 2020, the Supreme Court underlined the public's right to access law, over copyright claims, in *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020). The Court rejected Georgia's attempt to privatize ownership of non-binding annotations to the State's code. *Id.* at 1512-13. Georgia's legislature had contracted with LexisNexis to draft the annotations, subject to the approval of a legislative commission. *Id.* at 1505. The contract provided that LexisNexis retained an exclusive right to sell, distribute, or publish the annotated code. *Id.* The Court held, however, that the annotated code could not be copyrighted. *Id.* at 1506. Although the Court decided the case on copyright grounds, Chief Justice Roberts, writing for the Court, reinforced a "judicial

[1] *See* NCLA Comment Re: Revisions to Safety Standards for Infant Bath Seats, Docket No. CPSC-2009-0064 (submitted Oct. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Non-Full-Size Baby Cribs and Play Yards, Docket No. CPSC-2019-0025 (submitted Nov. 22, 2019); NCLA Comment Re: Revisions to Safety Standards for Toddler Beds, Docket No. CPSC-2017-0012 (submitted Nov. 25, 2019); NCLA Comment Re: Revisions to Safety Standards for Portable Bed Rails, Docket No. CPSC-2011-0019 (submitted March 26, 2020); NCLA Comment Re: Revisions to Safety Standards for Children's Folding Chairs & Stools, Docket No. CPSC-2015-0029 (submitted May 1, 2020); NCLA Comment Re: Revisions to Safety Standards for Sling Carriers, Docket No. CPSC-2014-0018 (submitted May 20, 2020).

consensus" dating back to the 19th Century that "authentic expression and interpretation of the law, which, binding every citizen, is free for publication to all." *Id.* at 1506-07 (quoting *Banks v. Manchester*, 128 U.S. 244, 253 (1888)) (emphasis omitted).

The "animating principle" behind the Court's decision in *Public.Resource.Org* was "that no one can own the law." *Id.* at 1507. Every citizen "'should have free access' to [the law's] contents." *Id.* In concluding the decision, the Chief Justice warned that a contrary holding would allow the government "to offer a whole range of premium legal works for those who can afford the extra benefit," or the government "might even launch a subscription or pay-per-law service." *Id.* at 1512-13.

Unfortunately, a "pay-per-law" service is not just some bleak, dystopian future—CPSC has been facilitating ASTM's operation of one for many years. CPSC has no constitutional power to withhold from the public the publication of the Commission's binding rules, and its decision to do so violates due process, the First Amendment, and equal protection. It would be prudent for CPSC to take this opportunity to reverse course.

I. STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. The administrative state poses an especially serious threat to civil liberties. No other current aspect of American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, a vastly different sort of government has developed within it—a type, in fact, that the Framers designed the Constitution to prevent.[2] This unconstitutional administrative state is the focus of NCLA's attention.

In addition to suing agencies to enforce constitutional limits on the exercise of administrative

[2] *See Generally* Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

power, NCLA encourages agencies to curb their own unlawful exercise of such power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. The courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law—not least by avoiding unlawful modes of governance. All agencies and agency heads must ensure that their modes of rulemaking, adjudication, and enforcement comply with the Administrative Procedure Act ("APA") and with the Constitution.

II. CPSC'S USE OF INCORPORATION BY REFERENCE

A. CPSC's Organic Statute & FOIA Require Free Access to the Law

The Consumer Product Safety Act (15 U.S.C. § 2051 *et seq.*) requires manufacturers of products under the Commission's regulatory authority to certify that the product complies with all applicable CPSC requirements. 15 U.S.C. § 2063(a). For children's products, the manufacturer must base this certification on tests of a sufficient number of samples by a third-party conformity assessment body accredited by CPSC to test according to the applicable requirements. *Id.* at § 2063(a)(2). Section 2056a(b)(1) requires CPSC to set product safety standards for children's products. *Id.* at § 2056a(b)(1). In doing so, CPSC may promulgate standards that "are substantially the same as" or "more stringent than" voluntary standards set in the industry by private third parties. *Id.* at § 2056a(b)(1)(B).

The Commission's organic statute unambiguously prohibits CPSC from promulgating a consumer product safety rule "unless the Commission publishes in the Federal Register the text of the proposed rule[.]" *Id.* at § 2058(c). CPSC may, in certain circumstances, promulgate voluntary safety standards as the Commission's binding consumer safety standard. *Id.* at § 2058(a)(5) (permitting the agency to invite the submission of voluntary safety standards); *id.* at § 2058(b)(1) (permitting the agency to promulgate a voluntary safety standard); *id.* at § 2056a(b)(1)(B) (requiring CPSC to promulgate durable nursery product safety standards that are "substantially the same" or "more stringent" than voluntary standards); *id.* at § 2056a(b)(4) (outlining the process to update voluntary

standards the Commission has adopted).

But the plain language of the provisions allowing the Commission to adopt voluntary safety standards makes clear that those standards become "a consumer product safety standard issued by the Commission." *Id.* at § 2056a(b)(4)(B); *see also id.* at § 2058(b)(1) (explaining that a voluntary standard adopted by CPSC is "promulgated … *as* a consumer product safety standard") (emphasis added). And, again, CPSC must publish the full text of any safety standard it adopts. *Id.* at § 2058. There is no ambiguity in this long-standing, straightforward statutory mandate.

Like CPSC's organic statute, the provisions of the APA, as amended by the Freedom of Information Act ("FOIA"), also require the Commission to publish the text of its substantive rules. Specifically, FOIA requires that an agency must "make available to the public" all "substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). Consistent with this requirement, an agency must "separately state and currently publish" its substantive rules "in the Federal Register for the guidance of the public." *Id.* This publication requirement implicates the right of affected persons to have notice of the law: "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.* at § 552(a).

There is, however, an exception to FOIA's general requirement that agencies must publish the full text of substantive rules. Section 552(a) creates a presumption that "a person has actual and timely notice" of a rule if the agency incorporates a provision by reference and makes that provision "reasonably available to the class of persons affected thereby … with the approval of the Director of the Federal Register." *Id.* According to the Proposed Rule, CPSC believed that this FOIA exception allowed the Commission to evade the plain mandate of 15 U.S.C. § 2058(c). *See* 85 Fed. Reg. at 18888 (citing 1 C.F.R. § 51.5(a), which governs the process for incorporation by reference under 5 U.S.C. § 552(a)).

It is important to bear in mind that Congress enacted CPSC's organic statute after FOIA's amendments to the APA, so any conflict between the two publication requirements should be resolved in favor of CPSC's later-enacted, more-absolute mandate. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 241 (2007). CPSC cannot simply rely on an older, more-general provision to save it from the precise directive in Section 2058(c). After all, CPSC *did not exist* when Congress enacted FOIA to increase free access to the law following high-profile fiascos during the New Deal. *See The Federal Register & the Code of Federal Regulations—A Reappraisal*, 80 Harv. L. Rev. 439, 440-41 (1966) (describing instances where the government "was seriously embarrassed" by its own lack of access to regulatory requirements). Years later, in 1981, when Congress enacted Section 2058(c)'s publication requirement, *see* Pub. L. 97-35, Sec. 1203(a) (1981), Congress was familiar with FOIA's requirements and still chose deliberately to mandate that CPSC "publish[] in the Federal Register the text of the proposed rule." 15 U.S.C. § 2058(c). This more-specific, later-enacted requirement demonstrates a clear congressional imperative for CPSC to follow the text of the law. The Commission must, therefore, "*publish* … the *text* of the proposed rule," *id.* (emphasis added), not direct the public to buy it from someone else.

In any event, the text of FOIA only confirms that CPSC cannot promulgate substantive rules without making the full text of the safety standard freely accessible to the public. Despite § 552(a)'s unambiguous mandate that agencies make all substantive rules "available to the public," CPSC interprets this statute to require something less. Relying on Part 51 of the Code of Federal Regulations,[3] CPSC provides the public with only a summary of its binding rule. *See* 85 Fed. Reg. at

[3] CPSC should not rely on OFR's legal interpretation. To the extent that 1 C.F.R. § 51.5 *et seq.* permits agencies to incorporate by reference private standards that are not freely available to the public, those rules also violate the plain language of 5 U.S.C. § 552 (a). "Otherwise undefined in the regulation, the OFR's attention to 'reasonably available' in Part 51 involves no consideration whatever of the price the standard's owner may be charging for access to it, now or in future years, or the

18882-87. If the public wishes to see the binding standard, CPSC purports to make physical copies available in only two places: CPSC's headquarters in Bethesda, Maryland, and down the road at the National Archives in Washington, D.C. *Id.* at 18894.

CPSC does not seem to appreciate its legal obligation to make its regulations publicly available. The Commission's organic statute imposes a publication requirement. *See* 15 U.S.C. § 2058(c). And neither Congress nor the Federal Register's incorporation-by-reference process *prohibits* CPSC from publishing its regulations online. CPSC mistakes the statutory availability of incorporation by reference as a prohibition against publishing its regulations in some readily accessible forum like, for instance, the Commission's website. Online publication would satisfy CPSC's publication requirement, 15 U.S.C. § 2058(c), without offending FOIA's incorporation-by-reference exception or the processes set out by the Federal Register. *See* 5 U.S.C. § 552(a); 1 C.F.R. § 51 *et seq.*

B. THE PROPOSED RULE IS PROCEDURALLY & SUBSTANTIVELY INVALID

CPSC has now proposed to incorporate by reference yet another private standard. *See Proposed*

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conditions being placed on that access." Peter L. Strauss, *Private Standards Organization & Public Law*, 22 Wm. & Mary Bill Rts. J. 497, 522 (2013).

OFR's failure as the ostensible check on agencies' use of incorporation by reference is unsurprising given the complete disinterest OFR has displayed toward the public's right to access the law. In 2014, OFR issued a direct final rule in response to a petition for rulemaking that argued the *en banc* Fifth Circuit's decision in *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), "cast[ed] doubt on the legality of charging for standards IBR'd [incorporated by reference]." Office of the Federal Register, *Incorporation By Reference*, 79 *Fed. Reg.* 66,267, 66,273 (Nov. 7, 2014). Several commenters complained that "any *charge* to an IBR'd standard effectively hides the law behind a pay wall[,] which is illegal and means the standard is not available." *Id.* at 66272. OFR's response sidestepped the constitutional issues. OFR acknowledged that incorporated materials "may not be as easily accessible as the commenters would like," but reasoned that the standards "are described in the regulatory text in sufficient detail so that a member of the public can identify the standard IBR'd into the regulation." *Id.* In other words, the people demanded their right to access the laws, and OFR said, "here, you can have a little summary instead." OFR "applaud[ed] the efforts of [] private organizations to make their IBR'd standards available to the public[,]" but disclaimed any authority "to require [private organizations] to upload and maintain their standards on their websites[.]" *Id.* at 66271. Agencies must do more than merely hope and suggest that private standard setters will make law available. They must fulfill that duty themselves.

Rule, 85 Fed. Reg. 18878. Indeed, the Proposed Rule exists solely to update the reference to the ASTM International voluntary standard governing crib bumpers. *Id.* at 18879. Rather than set out the standard in full, CPSC proposes to incorporate it by reference. *Id.* at 18888. And instead of informing the public of the precise requirements (or changes) set by law, CPSC insists the law "is reasonably available to interested parties" for purchase "from ASTM International" or for "inspect[ion]" in person at CPSC's office in Bethesda, MD. *Id.* During the comment period, a read-only copy of the standard can be viewed "[b]y permission of ASTM," on the ASTM website, but not downloaded or printed. *Id.* Once the Proposed Rule becomes effective, however, CPSC makes no representation that ASTM will grant the public "permission" to view the binding standard on its website. *See id.*

Put simply, the public's access to the law rests entirely on the whims of ASTM, and the public is still unable to participate meaningfully in the notice-and-comment rulemaking process. The Proposed Rule does not suggest that ASTM is under any legal compulsion to keep the standard available for free in its online reading room. Indeed, ASTM is under no legal compulsion to keep the standard published at all. Rather, it remains ASTM's prerogative to amend or withdraw the standard or increase the standard's price at any time—without regard for notice-and-comment rulemaking or the public's right to free access to the law. Right now, a copy of ASTM F1917-12 costs $52.00 to purchase. *See* ASTM International, ASTM F1917-12, Standard Consumer Safety Specification for Infant Bedding and Related Accessories, https://www.astm.org/database.cart/historical/F1917-12.htm. These fees to buy a copy of the standard are about double the cost of a crib bumper, which sells for around $30.00. *See* Crib Bumper, *Amazon.com*, https://www.amazon.com/s?k=crib+bumper&ref=nb_sb_noss_2. ASTM also has every incentive to update the standard as often as possible, forcing all interested parties to repurchase it.

Beyond ASTM's freedom to renege on its promise to keep the standard on its website, ASTM prohibits the dissemination of its read-only standards. This policy (as embraced by the Commission)

infringes the First Amendment rights to speak freely about the Proposed Rule, to petition CPSC to promulgate more (or, in some cases, less) stringent safety standards, and to read about the Proposed Rule in the press.

The Proposed Rule flouts Congress' plain command to make law publicly available. Law is not "available to the public" if it is "conditioned on the consent of a private party," *Am. Soc'y for Testing & Materials, et al. v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458 (D.C. Cir. 2018) ("*ASTM*") (Katsas, J., concurring), and made available only to ASTM's customers rather than the public at large. The availability of CPSC's rule is—and will continue to be—unreasonable so long the Commission permits ASTM to control the public's access. At any time, ASTM can reduce the standard's price to $0, increase the price exponentially, or remove the standard from its website entirely. Indeed, the Proposed Rule explicitly states that public access to the ASTM standard is conditioned on the "permission of ASTM." *Proposed Rule*, 85 Fed. Reg. 18888. By tying the public's access to the whims of a private entity, CPSC has violated FOIA and the agency's own organic statute.

Moreover, CPSC's claim that the standard is publicly available "[b]y permission of ASTM"—in a read-only file that cannot be freely used or distributed—does not satisfy the Commission's obligation to ensure the standard's availability during notice and comment. *Id.*; *see also* 5 U.S.C. §§ 553 & 706(2)(D); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.").

This state of affairs would be bad enough if CPSC followed its own understanding of FOIA's requirements, but CPSC has gone further and refused to honor its own commitment to providing access to the relevant standards at its reading room—despite what it has represented to the Office of the Federal Register. For one, the phone number CPSC provides in the Proposed Rule is no longer

in service. Once an interested person does manage to get a hold of CPSC, it quickly becomes clear that the phone number is not the only inaccuracy in the Proposed Rule.

CPSC's complete failure to make the standard freely available during the notice-and-comment period, and the Commission's reliance on ASTM to make the standard available after the rule becomes final, violates the substance and the process of FOIA, 5 U.S.C. §§ 552(a), 553, and the Commission's own organic statute. 15 U.S.C. § 2058.

III. INCORPORATION BY REFERENCE IS UNCONSTITUTIONAL

The Proposed Rule is unconstitutional because CPSC cannot withhold publication of its binding rules. Its decision to do so deprives the regulated public of notice of legal obligations (as required by due process) and free access to the law (as required by the First Amendment). Additionally, the Proposed Rule also fails to provide equal protection under the law because ASTM's members receive preferential treatment and access to the law not available to non-members.

A. OUR CONSTITUTIONAL SYSTEM DOES NOT ALLOW FOR PRIVATELY HELD LAW

As the Supreme Court reiterated again this Term, there is a longstanding "rule [] that no one can own the law." *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507. Citizens are the authors of the Republic's laws, and the law must remain free in the public domain. *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799-800 (5th Cir. 2002) (*en banc*). As such, citizens "must have free access to the laws which govern them." *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) [hereinafter "*BOCA*"]; *see also Public.Resource.Org*, 140 S. Ct. 1507 ("'[I]t needs no argument to show … that all should have free access' to [the law's] contents.") (quoting *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)). Without access to the law, citizens cannot give their informed consent to be governed. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality) ("It is difficult for [the People] to accept what they are prohibited from observing.").

Making the law inaccessible is a trick of tyrants. *See* Suetonius, *The Lives of the Twelve Caesars*, *Caligula* 470 (1907) ("When taxes of this kind had been proclaimed, but not published in writing, inasmuch as many offences were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, *to prevent the making of a copy.*") (emphasis added). "Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

CPSC's attempt to privatize ownership of the law is contrary to our basic form of government. By refusing to publish a copy of the standard that CPSC incorporated by reference, CPSC has granted ASTM monopoly ownership of the law. But an ownership interest in the Proposed Rule is not CPSC's to give away. *See Veeck*, 293 F.3d at 799-800. The Proposed Rule, therefore, was contrary to CPSC's constitutional power. *See* 5 U.S.C. § 706 (2)(B).

Like all law in the United States, the Proposed Rule is—and must remain—part of the public domain. *Veeck*, 293 F.3d at 799-800. "[N]o one can own the law." *Public.Resource.Org, Inc.*, 140 S. Ct. at 1507.

B. THE DUE PROCESS CLAUSE REQUIRES FREE ACCESS TO LAW

Preventing free public access to the law not only violates our constitutional compact, it also violates due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Due process under the Fifth Amendment requires at least this much. *Id.*; *see also Armstrong v. Maple Leaf Apartments, Ltd.*, 436 F. Supp. 1125, 1145 (N.D. Okla. 1977) ("The Court further concludes that the due process of law rights of the defendant as guaranteed by the Fifth Amendment of the United States Constitution were violated in the application to this case

for the reason that Congress did not provide any reasonable means by which the defendants or their attorneys could have acquired notice or knowledge of the existence or content of the Act."), *aff'd in part*, 622 F.2d 466 (10th Cir. 1979).

Courts have long recognized that limiting access to legal requirements offends basic precepts of due process. In *Banks*, the Supreme Court concluded that judicial opinions could not be copyrighted, in part because of the "public policy" requirement that "[t]he whole work done by the judges constitutes the authentic exposition and *interpretation of the law, which, binding every citizen, is free for publication to all*, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." 128 U.S. at 253-54 (emphasis added). The First and Fifth Circuits have announced similar standards more recently:

> Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

BOCA, 628 F.2d at 734; *see also Veeck*, 293 F.3d at 799-800 (following *Banks* and *BOCA*).

No one can claim to be ignorant of or misled by what the law requires because "everyone[] has access to the law." *Ruehl v. Viacom*, 500 F.3d 375, 384 (3d Cir. 2007); *see also Public.Resource.Org*, 140 S. Ct. at 1507 ("'Every citizen is presumed to know the law,' and 'it needs no argument to show … that all should have free access' to its contents.") (quoting *Nash*, 6 N.E. at 560). Without access to the law, this logic collapses. And, as the Supreme Court made clear in *Public.Resource.Org*, placing a price on viewership of the law would cause many "to think twice before using official legal works that illuminate the law we are all presumed to know and understand." 140 S. Ct. at 1513.

A scheme, like the one perpetuated by the Proposed Rule, violates these basic principles of due process by failing to notify the public of the standard the Proposed Rule incorporates by reference. "[I]f notice is to be effective, ready public access must be provided to anyone potentially affected by

the law, not just to those who must comply." Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Regulatory Use of Private Standards*, 112 U. MICH. L. REV. 737, 771 (2014). Without access to binding law, "a person might never be aware of a document containing a regulation affecting him until some federal bureaucrat produced a copy of the document and attempted to apply it to him." *Cervase v. Office of the Fed. Register*, 580 F.2d 1166, 1168 (3d Cir. 1978).

But under CPSC's current regime, anyone seeking access to the content of the law must either pay a private entity for the privilege or make the trip to Bethesda, MD, for the right to simply see (but even then, not copy) the law in the agency's reading room—and even that latter option does not really exist. This absurd policy offends the most basic requirement that the law be knowable, and it smacks of placing the law "in a very narrow place and in excessively small letters, to prevent the making of a copy." *See The Lives of the Twelve Caesars* 470; *Nash*, 6 N.E. at 560 ("[I]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes.").

Instead of publishing the Proposed Rule in a place where the public could access the law freely, CPSC is creating a monopolistic pricing system. CPSC's rule forces the access-seeking public to rely on the whims of ASTM, a private organization with every incentive to drive up the market prices for its standard(s). And whenever demand for purchase of the applicable standard decreases, ASTM can simply amend the standard, forcing all interested parties to repurchase it. The effects of this monopolistic-pricing system are not merely theoretical. Columbia Law School Professor Peter Strauss has identified instances of private organizations like ASTM charging *less* money for new standards than for an out-of-date standard that is still incorporated-by-reference into an agency's binding rule. Strauss, 22 Wm. & Mary Bill Rts. J. at 509-10. The market price for an incorporated standard will "be artificially inflated" and that price "will persist even after the standard has been modified or displaced by … a voluntary consensus standard, if the governing law incorporating the earlier version of the

standard has not changed." *Id.* at 513, 519. "[T]he price for the standard is a price for the law, plain and simple." *Id.* at 513.

Indeed, such artificial inflation is precisely what is occurring here. While the Proposed Rule seeks to adopt ASTM F1917-12, ASTM has recently issued a revision, F1917-20, that supersedes the prior standard. While the brand-new F1917-20 is available for purchase on the ASTM website for $50.00, the older F1917-12 standard of the Proposed Rule sells for $52.00. *See* ASTM International, ASTM F1917-20, Standard Consumer Safety Specification for Infant Bedding and Related Accessories, https://www.astm.org/Standards/F1917.htm; ASTM International, ASTM F1917-12, Standard Consumer Safety Specification for Infant Bedding and Related Accessories. https://www.astm.org/database.cart/historical/F1917-12.htm.

Moreover, this price and other limitations on access "are not random; they systematically exclude people based on budgetary constraints. For many of these rules, budgetary constraints likely will be connected with substantive interests under the rule." Mendelson, 112 Mich. L. Rev. at 791. Because individual consumers are "generally likely to have smaller budgets than manufacturers[,]" "[a] financial barrier to accessing product safety standards is likely to distinctively and systematically disadvantage consumer interests." *Id.* And even for individual consumers who could afford to travel to Bethesda to view the standard in CPSC's reading room, that decision makes little financial sense for any member of the public whose geographic distance would cause travel costs to exceed the standard's cost—let alone the cost of a crib bumper!

The Commission's failure to publish the standard underlying the Proposed Rule deprives the public of fair notice in violation of due process regardless of what price ASTM may set for the standard.

C. THE FIRST AMENDMENT PROTECTS FREE ACCESS TO LAW

CPSC's failure to make the Proposed Rule's binding safety standards publicly accessible also

violates the First Amendment. The Supreme Court has explained that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Limitations of the public's free access to the law undermines First Amendment rights to discuss governmental affairs, petition the government, and operate a free press. *See Richmond Newspapers*, 448 U.S. at 575-76 ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."). The First Amendment requires free access to the law.

The current practice of making standards available only in Bethesda does not solve this problem. Nor would CPSC's reliance on ASTM's online reading room. Citizens must be able to do more than "investigate" what the law says, they must be able to disseminate that information and discuss the law's contents freely.

D. THE PROPOSED RULE FAILS TO PROVIDE EQUAL PROTECTION OF THE LAW

Finally, the Proposed Rule also violates the Fifth Amendment's "prohibition against denying to any person the equal protection of the laws." *U.S. v. Windsor*, 570 U.S. 744, 774 (2013). The Due Process Clause of the Fifth Amendment requires the federal government to provide for equal protection of the law to the same extent as the Fourteenth Amendment's Equal Protection Clause. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) (collecting cases). As relevant here, a regulation that "discriminates among speech-related activities in a public forum" must "be finely tailored to serve substantial state interests, and the justifications offered for any distinctions must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

The Proposed Rule, and the scheme that CPSC has constructed, infringes the speech-related activities of non-members of ASTM while creating a preference for ASTM's membership. If CPSC had developed the safety standard for crib bumpers, rather than merely adopting ASTM's standard,

the agency would be required to disclose critical data and information on which it relied. *See Portland Cement*, 486 F.2d at 393. But because ASTM developed the standard in private, sheltered from public input and scrutiny, CPSC claims that it can withhold from public view the standard the Commission plans to adopt in addition to any data relating to ASTM's processes.

CPSC's failure to make the standard it proposes to adopt equally available to all unfairly favors members of ASTM, who can freely access the standard as it is being developed, during notice-and-comment rulemaking, and after implementation. *Cf.* Brief for Administrative Law Professors as Amici Curiae in Support of Neither Party, *Milice v. CPSC*, No. 20-1373 (3d Cir. May 29, 2020) (explaining that private organizations like ASTM advertise to their members the benefits of being in a position to influence government policies and decisions). By contrast, interested persons and manufacturers who are not ASTM members cannot freely access the standard during its development, during the comment period of the rulemaking process, nor after the comment period ends. This disparity is magnified once one considers that CPSC relies on ASTM's reading room to make the standard "reasonably available" yet ASTM will not put the standard in its reading room after public comment is closed.

Manufacturers are legally bound by the standards, which can have profound impacts on product testing and a product's market viability, and consumers depend on effective standards. CPSC's failure to publish the standard it plans to adopt not only deprives the comment process of valuable insights that manufacturers could offer, the Commission also disproportionately infringes the First Amendment rights of those who are not ASTM members. The Proposed Rule does nothing to alleviate the unconstitutional effects of the unequal treatment it propounds. There is no fine tailoring in the Proposed Rule. *See Carey*, 447 U.S. at 461-62.

Further, CPSC's continued failure to publish the standards that it plans to incorporate by reference does not "serve substantial state interests." *Id.* at 461. Mere administrative convenience in

letting private organizations like ASTM control the standard-writing process does not justify the deprivation of constitutional rights. *See Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973). Indeed, "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *INS v. Chadha*, 462 U.S. 919, 944 (1983). Because CPSC cannot justify its unequal treatment of non-ASTM members by pointing to any substantial state interest, the Proposed Rule violates the constitutional guarantee of equal protection under the law.

* * *

The Proposed Rule is just the latest installment in CPSC's unconstitutional pay-per-law service run by a private monopolist. *See Public.Resource.Org*, 140 S. Ct. at 1513. In promulgating this series of rules behind a paywall, CPSC violates several constitutional guarantees and at least four provisions of the APA, 5 U.S.C. § 706(2). Of course, CPSC could avoid these problems by simply publishing the legal standard in full in the Code of Federal Regulations instead of incorporating it by reference, or CPSC could make a copy of the standard it incorporates freely available on the Commission's website. Publication of these binding standards would likely fall within the fair-use doctrine, *see ASTM*, 896 F.3d 437 at 458; and CPSC is in a better position than individual members of the public to litigate any copyright dispute or negotiate a fee with ASTM to make the standard publicly available. *Cf. Public.Resource.Org*, 140 S. Ct. at 1511 (recognizing that courts must apply precedent that holds law is not subject to copyright, even if that holding makes it more difficult for a government agency to negotiate price with private organizations that draft legal provisions; this problem, the Court concluded, is one for Congress to solve).

Ultimately, CPSC should not continue to repeat the mistakes that led Congress to create the Federal Register and the Code of Federal Regulations. If the regulated public cannot discern its legal obligations, then the public has no hope of conforming its behavior to these requirements. NCLA has already petitioned the Third Circuit to review CPSC's incorporating one ASTM standard by

reference. *Milice v. CPSC*, CA3 Case No. 20-1373 (filed Feb. 20, 2020). Should CPSC insist on continuing to incorporate ASTM standards by reference without making those standards freely available, NCLA will not hesitate to bring further legal action to challenge these improperly promulgated rules in federal court

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Thank you again for this opportunity to provide NCLA's views on this important issue. Should you have any questions, please contact Jared McClain, Staff Counsel, at jared.mcclain@ncla.legal.

Sincerely,

NEW CIVIL LIBERTIES ALLIANCE

__/s/_____
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